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COMMISSION ON HUMAN RIGHTS

Intersessional open-ended working group
for the elaboration of a draft optional
protocol to the Convention on the Rights
of the Child on the sale of children,
child prostitution and child pornography
Fifth session
25 January-5 February 1999

COMMENTS ON THE REPORT OF THE WORKING GROUP

Note by the Secretary-General

CONTENTS

		Page
Introduction		2
I.	COMMENTS RECEIVED FROM STATES	3
	Argentina	3
	Trinidad and Tobago	5
II.	COMMENTS RECEIVED FROM UNITED NATIONS BODIES, SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS	7
	Council of Europe	7
	European Commission of Human Rights	9
	United Nations High Commissioner for Refugees	9
	United Nations Population Fund	11
III.	COMMENTS RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS	11
	World Alliance of Reformed Churches	11
IV.	COMMENTS RECEIVED FROM OTHER ORGANIZATIONS	12
	Australian Human Rights and Equal Opportunity Commission	12

Introduction

1. In paragraph 9 (a) of its resolution 1998/76, entitled "Rights of the Child", the Commission on Human Rights requested the Secretary-General to transmit the report of the working group on the question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography to Governments, relevant specialized agencies, the Committee on the Rights of the Child, the relevant Special Rapporteur and intergovernmental and non-governmental organizations and to invite their comments, inter alia on the scope of the optional protocol, in time for circulation prior to the next session of the working group.

2. Pursuant to this resolution, the Secretary-General, on 27 July 1998, addressed requests to Governments and intergovernmental and non-governmental organizations concerned, as well as to the Special Rapporteur on the sale of children, child prostitution and child pornography and the Committee on the Rights of the Child, for their comments.

3. As of 19 November 1998, replies have been received from the Governments of Argentina and Trinidad and Tobago.

4. Replies were also received from the Council of Europe, the European Commission of Human Rights, the Office of the United Nations High Commissioner for Refugees and the United Nations Population Fund.

5. Comments were submitted by the Human Rights and Equal Opportunity Commission and the World Alliance of Reformed Churches.

6. The present report contains a summary of the substantive replies received. Any additional replies will be reproduced in an addendum to the present report.

I. COMMENTS RECEIVED FROM STATES

Argentina

[Original: Spanish]
[15 October 1998]

The Government of Argentina made the following comments on the draft optional protocol:

1. Definition of "sale of children"

Argentina has argued the need to have a definition of "sale of children" which covers the different forms this criminal phenomenon can take, that is, to treat the "sale" as an act to be condemned in itself, regardless of its purpose or any remuneration agreed upon.

This is the sense of the Inter-American Convention on International Traffic in Minors, adopted by the V Inter-American Conference on Private International Law, which in article 2 expressly defines traffic as including the acts of abduction, removal or retention of a minor for unlawful purposes or by unlawful means.

The position taken in the Inter-American Convention does not conflict with the idea of an Optional Protocol to the Convention on the Rights of the Child: from an analysis of articles 34 and 35 of the latter, it is evident that a distinction is made between the case of protection against the sexual exploitation of children (article 34) and the case of the sale of or traffic in children for any purpose or in any form (article 35). If the purpose of that international instrument had been to deal with the two questions by linking them closely as being related in nature and kind, it would be impossible to explain the express use of the terms "for any purpose or in any form" at the end of article 35. To maintain that article 35 refers to sale for the purpose of sexual exploitation or abuse entails a serious difficulty of a logical nature which would be hard to resolve.

To return to the question of the definition, it should be pointed out that according to the document prepared by the Secretary-General and submitted to the United Nations Commission on Crime Prevention and Criminal Justice (E/CN.15/1997/12), existing international law contains no express provisions on the sale of children for purposes other than slavery (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery).

As far as the definitions of "sale of children" drafted by the Working Group are concerned, therefore, Argentina considers that it would be appropriate to adopt the first one.

2. Definition of "child prostitution"

For the purposes of characterizing as unlawful - without giving rise to differing interpretations - any activity relating to sexual "services" or "activities" of a child, the word "unlawful" used in the draft definition should be deleted.

3. Chapter IV of the draft

Chapter IV deals with penalization and prosecution in one and the same section. There is also a proposal that questions relating to jurisdiction should be dealt with in the same chapter.

On this point, Argentina considers that due prominence should be given to a subject which, although it was introduced into the draft at this country's proposal, ought from a methodological point of view to be split up. It therefore seems appropriate, firstly, to recommend characterizing the sale of children as an offence, in the way it is defined, and then in another article to recommend doing the same for attempts and other forms of participation.

Apart from this, there is a phrase added in square brackets on "connected [criminal] acts", terms which are not very precise for inclusion in the text of a treaty.

With regard to the penal consequences, Argentina considers that the emphasis should be on the protection of child victims of such acts rather than on the question of their liability. This opinion, expressed previously by our country, appears in square brackets, but the protection of children who are victims should be a clear aim of the Protocol, and hence the square brackets should be deleted. This is also the sense of the Inter-American Convention on the subject, which in article 4 calls for broad cooperation between States Parties and States that are not Parties "in protecting and caring for minors who are victims of that wrongful act".

As regards the provisions on the prosecution of legal persons, the addition of the wording to the effect that they can be prosecuted providing that that is not inconsistent with the legal system of the State seems appropriate.

4. Matters remaining for discussion

In part 2 of the report, there is a section on "Seizure and confiscation". There are drawbacks in general to the use of the Spanish term "confiscación" as a translation for the English "confiscation", but it should be borne in mind that in Argentine law "confiscación" is prohibited by the National Constitution. It would therefore be more correct to refer to "decomiso", the term used in various international instruments.

Trinidad and Tobago

[Original: English]
[7 October 1998]

The Government of Trinidad and Tobago submitted the following comments on the draft optional protocol:

Chapter II. Definitions

1. Sale of children

The first definition of the sale of children should incorporate the following phrase found in the second definition; "... any person having custody or control over the child ...".

2. Child prostitution

This definition should include all the words placed in square brackets, as well as the words "and/or" between the words "activities" and "services".

3. Child pornography

This definition is found acceptable with the inclusion of the words placed in square brackets. In this context, the Netherlands proposal (art. 1) is also found acceptable.

Chapter IV. Penalization of offenders and protection of [children] [child victims]

Penalization and prosecution

1. Mention should be made of children who themselves abuse other children and who should therefore be considered and treated as offenders, subject to applicable rules of the State Party with regard to criminal responsibilities and rehabilitation and counselling.

[bis] is acceptable to this country.

(a) This country is supportive of this statement - not including the final phrase: "[subject to the legal system of the State]".

2. This paragraph is accepted in its entirety.

Chapter IV. Prevention, assistance and compensation

This entire section is found to be acceptable.

Part 2. Texts left from the previous session for consideration by the working group at its next session

Chapter IV. Penalization of offenders and protection of [children] [child victims]

1. Penalization and prosecution

This paragraph is accepted inclusive of the words in square brackets. It is suggested that child sex tourism should also be included after the words "child pornography".

2. Extradition

This section is comprehensive - and therefore acceptable to this country.

3. Mutual judicial assistance

Paragraphs 1 and 2 are found acceptable.

4. Seizure and confiscation

All the words placed within square brackets should be included in this paragraph.

5. Protection of [children] [child victims]

2. The measures listed under this paragraph are found to be encompassing. However, delete the word "non" in square brackets in subparagraph (a).

4. This paragraph is acceptable.

6. This paragraph is accepted as worded.

Chapter V. International cooperation and coordination

All the articles hereunder have met with approval. Please note, however, that as a developing nation Trinidad and Tobago would need to seek international financial assistance to actively implement article H.

Preamble (former chapter III: Implementation of pertinent instruments)

Proposal submitted by the delegation of the United States of America acting as coordinator

The proposal is noted that the following observations are made:

It is crucial that specific measures be also taken to prevent, as far as possible, the access of children to the material mentioned here.

The cooperation with international and non-governmental organizations should also extend to the area of child sex tourism.

With regard to child sex tourism, elimination of the consumer market may not be possible. Therefore, other measures must be devised to address this situation.

With regard to the implication that "poverty or underdevelopment create an environment which may lead to child exploitation, the sale of children, child prostitution and child pornography", it must be noted that the markets for these activities are already well established and entrenched in the societies of the more developed countries and that advanced technology (especially with regard to telecommunications) serves to enhance the dissemination of such material.

This country would wish to underscore the emphasis placed on the concern over sex tourism both directly promoting the sale of children, child prostitution and child pornography; and on the legitimate adoption and foster placement of children consistent with the international conventions and declarations.

Proposal submitted by Denmark

This country would like to humbly suggest that the preamble proposal also include fair treatment to the victims of the said offences, with special regard to the issues of protection and confidentiality.

Proposal submitted by the delegation of Australia acting as a coordinator for Chapter V

This proposal was noted and the following observation is made:

Wherever reference is made to offensive acts, child sex tourism should also be included.

Chapter VIII. Other matters

Proposal submitted by the Islamic Republic of Iran on the structure of the protocol.

This proposal for the structure of the protocol is found to be acceptable.

II. COMMENTS RECEIVED FROM UNITED NATIONS BODIES, SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

Council of Europe

[Original: English]
[24 September 1998]

The draft option protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as basic measures needed for their eradication, reflects both the structure of

and the concerns expressed in Recommendation No. R (91) 11 of the Committee of Ministers on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults.

As presently drafted, its scope also covers the relevant part of Recommendation No. R (97) 13 of the Committee of Ministers on the intimidation of witnesses and the rights of defence, which deals, inter alia, with measures to be taken in relation to vulnerable witnesses, including in particular children, especially in the case of crime within the family.

It goes without saying that strengthening the international protection of children against these forms of exploitation is a crucial endeavour in which Governments, NGOs and international organizations should join. The draft optional protocol is an important step in this direction; it complements existing international instruments and contributes to maintaining the momentum created by the 1996 Stockholm World Congress against Commercial Sexual Exploitation of Children.

Against this background, the draft protocol also clearly reflects the new political impetus for the Council of Europe's activities in favour of children which was provided for by the Action Plan adopted at the Second Summit of Heads of State and Government of the Council of Europe (Strasbourg, 10-11 October 1997), where the Heads of State and Governments agreed, inter alia, to extend their cooperation, within the Council of Europe, with a view to preventing all forms of exploitation of children, including through the production, sale, marketing and possession of pornographic material involving children.

Furthermore, the scope of the draft protocol is also in line with the conclusions and recommendations adopted at the European follow-up conference to the World Congress against Commercial Sexual Exploitation of Children (Strasbourg, 28-29 April 1998), among which are the following:

> That the practical difficulties encountered by international judicial and police cooperation be identified, and the possible lacunae in relevant European penal and civil law be overcome; and more concretely,
>
> That in the legal area, Council of Europe future activities be focused on the practical difficulties arising in international legal cooperation with regard to cases involving sexual exploitation of children for commercial purposes.

In the light of the fact that child victims of sexual exploitation frequently suffer from what is called "secondary victimization", the main focus of the draft optional protocol's provisions on victim protection throughout proceedings merits particular support. This reflects the general concern, expressed also by the above-mentioned conference, that criminal justice systems need to be much more sensitive and responsive to the needs of children who appear as child witnesses, child victims or, more frequently in the case of sexual abuse and commercial sexual exploitation, as witness and victim. It might be desirable to expand the existing draft provisions on this subject, taking into account the relevant experience and new arrangements which exist in many Western European countries.

As most international instruments in this area address exclusively the sexual exploitation of children for commercial purposes, it might be worthwhile to explore to what extent "simple" sexual abuse of children outside an economic context could usefully be dealt with by the optional protocol. In fact, the widely publicized cases of paedophile crime in several European countries suggest that these matters merit review, not only at national, but also at international level. This was also strongly recommended by the above-mentioned European follow-up conference. Following the relevant concerns expressed by the conference on the issue of the use of new communication technologies (namely, the Internet) for the purpose of sexual exploitation of children and the effective management of sex offenders in the community and in penal institutions might also be taken into consideration by the working group, with a view to addressing these matters in the draft opticnal protocol.

European Commission of Human Rights

[Original: English]
[12 October 1998]

The project of drafting a protocol deserves full support and all efforts undertaken in this matter are to be appreciated. The draft as it stands could, perhaps, be improved by inserting a clause imposing on the Contracting States an obligation to pay compensation when it cannot be obtained within a reasonable time limit after the event from the perpetrator, i.e. from "those legally responsible". In fact the perpetrator will normally be sentenced to imprisonment and as a consequence will not be in a position to pay damages.

It is already the practice in many democratic States to provide for compensation for victims of criminal actions. In particular, children, who are more vulnerable and defenceless than adults, should not be left with the only possibility of seeking redress from "those legally responsible".

Office of the United Nations High Commissioner for Refugees

[Original: English]
[23 September 1998]

More than half - currently some 52 per cent overall - of the world's 26.1 million refugees and other "persons of concern" to UNHCR are children and adolescents under the age of 18. In some refugee situations, this figure rises to 66 per cent. Many of today's conflicts last the whole length of a childhood, such that from birth to adulthood, displacement and armed conflict are the only reality known to millions of children and adolescents. Throughout this period, refugee children are at higher risk of exploitation, given the often unstable situations in which they find themselves. Against this background, strengthening the standards for international legal protection against exploitation is of significant interest to UNHCR. We thus strongly support the development of the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography as a means of better protecting children, including refugee children.

We note from the report of the Working Group the debate as to whether the definition of "sale of children" should be limited in scope to the sale of children for the purposes of sexual exploitation. While we acknowledge that international legal standards to prohibit other forms of exploitation, such as the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption and the ILO conventions, already exist, it is the view of UNHCR that an optional protocol which seeks to ensure protection against the sale of children for the purposes of any form of exploitation would be fitting. The standards could thus appropriately cover both articles 34 and 35 of the Convention on the Rights of the Child, rather than having a limited focus on only one article. While setting comprehensive standards, the optional protocol could usefully refer to the need to respect and comply with already existing international standards in this regard.

The risk of sexual exploitation is a very serious one for refugee children. But refugee children are often also vulnerable to other forms of exploitation. As an example, UNHCR experience has shown that refugee children, and children recently voluntarily repatriated to their countries of origin, are increasingly facing compulsory child labour. Comprehensive standards in an optional protocol to the Convention on the Rights of the Child to combat the sale of children for the purposes of any form of exploitation would be an important legal contribution to the protection of refugee children. It is important to highlight that the Convention is the international human rights instrument with the largest number of State Parties and, indeed, serves for UNHCR as the central frame of reference for the protection of refugee children.

As both a response and prevention mechanism, UNHCR also believes that the optional protocol should address the need for State Parties to establish criminal laws against child exploitation. Both national and extraterritorial coverage would be important elements, given the fact that children, including refugee children, are often taken across international borders for exploitation purposes.

UNHCR also strongly supports the inclusion of the need for State Parties to take all feasible measures to ensure appropriate protection and assistance to child victims of exploitation. Appropriate standards for their treatment, in accordance with the principle of the best interests of the child, are important to ensure that children are indeed recognized as the victims of exploitation practices. These standards would be most relevant, for example, when and if the child is to appear as a witness in court proceedings. Measures to facilitate the reintegration of the child victim into his or her family and community should also be required of State Parties, as a means of supporting article 39 of the Convention.

UNHCR stands ready to further assist the Working Group in its deliberations in the drafting of this optional protocol in any way deemed appropriate.

United Nations Population Fund

[Original: English]
[25 August 1998]

The United Nations Population Fund would like to see reference to the need for States Parties to take all appropriate measures to address all aspects of education and empowerment, as well as in relation to the adolescent girl's health needs, in particular management of complications arising from unsafe abortion, HIV/AIDS, the prevention of pregnancy and STD related problems, including family counselling where relevant. Reference could also be made to the need for relevant in and out of school programmes and open, informed discussion of the adolescent girl's reproductive and sexual health, and to the development and consolidation of teaching/learning modules and materials which can be easily adopted to local groups and situations.

Such a reference would build on the international standards set by the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, and the consensus reached in the Programme of Action of the International Conference on Population and Development and the Beijing Platform of Action, which recognized the right to adolescent girls to reproductive and sexual health, including information, counselling and services.

III. COMMENTS RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS

World Alliance of Reformed Churches

[Original: Spanish]
[1 October 1998]

Penalization and prosecution

In sentencing the criminal, the age of the child victim should be treated as an aggravating circumstance. The penalty will be greater the younger the victim, and also if the offences of child prostitution, sale or pornography have been committed, or any other offence which violates the child's physical, psychological and spiritual health.

Prevention

States Parties should have controls on media which lead children into prostitution and drug-taking.

States Parties should place controls on television and electronic media in respect of subliminal messages which undermine sexual morality and encourage pornography.

IV. COMMENTS RECEIVED FROM OTHER ORGANIZATIONS

Australian Human Rights and Equal Opportunity Commission

[Original: English]
[5 January 1998]

Notwithstanding the almost universal ratification of the Convention on the Rights of the Child, the worldwide exploitation and abuse of children continues. A particularly disturbing trend is the increasing internationalization of the sale of children, child prostitution and child pornography. These activities are occurring not just at the domestic level but also across national boundaries. The need for international cooperation in this area is without doubt an urgent one.

Against this background, at a meeting of national human rights institutions held in conjunction with the Vienna World Conference on Human Rights in 1993, the President of the Human Rights and Equal Opportunity Commission and the then Human Rights Commissioner of Australia presented an initiative calling for the urgent preparation of an optional protocol to the Convention on the Rights of the Child specifically strengthening measures directed at the protection of children from prostitution, trafficking and other forms of abuse and sexual exploitation. The proposal received unanimous support from other human rights commissions. The meeting resolved that the Protocol should be submitted to the United Nations for urgent consideration by Member States and that all Member States should accord this issue the highest priority and respond effectively to abuses which are occurring.

The Australian Human Rights and Equal Opportunity Commission was given responsibility for preparing a draft of the proposed optional protocol. At a meeting of national human rights institutions in December 1993 in Tunis, this draft was accepted without amendment. At its fiftieth session, in February/March 1994, the Commission on Human Rights agreed to establish a working group to develop the optional protocol, using the draft produced by our Commission and approved by other Commissions as the basis for negotiation.

The Commission remains strongly committed to this proposal. An optional protocol would be valuable in building on article 34 of the Convention on the Rights of the Child, which deals with sexual exploitation of children. It would give meaning and specificity to the general provision in article 34 and in particular the requirement for State Parties to take "all appropriate ... measures" to prevent sexual exploitation of children.

The optional protocol will also play an important part in implementing the commitments made by the international community at the World Congress against the Commercial Sexual Exploitation of Children in Stockholm in August 1996.

Provisions and scope of the protocol

In a January 1996 discussion paper, the Australian Human Rights and Equal Opportunity Commission made a number of recommendations concerning the provisions in the proposed optional protocol. They included the following:

A definition clause should be included in the optional protocol, consistent with the language in the Convention on the Rights of the Child.

The definitions of sexual exploitation, child prostitution, child pornography and sexual conduct in the optional protocol should reflect the level of precision appropriate to criminal activity but also be wide enough to encompass the range of matters which could reasonably be expected to fall within the definitions. Definitions should be inclusive rather than exhaustive. Definitions should be sufficiently broad to cover not just acts of exploitation, but also associated activities, such as promoting, advertising, facilitating, inducing and so on.

The definition of child prostitution for the purpose of the optional protocol should be drafted in such a way as to cover both the purchaser and the other parties involved in the transaction, but to avoid any blame or criminality falling on the child.

Consideration should be given to measures necessary for States Parties to give effect in their national legislation to the principles of the optional protocol, including appropriate sanctions.

Consideration should be given to appropriate measures by States Parties to establish jurisdiction over offences in the optional protocol, particularly in circumstances where the offence is committed outside the territory of a State Party by one of its national.

The optional protocol should contain measures to ensure mutual cooperation between States Parties in the prevention, detection, prosecution and punishment of offences under the protocol. Mutual assistance may cover matters such as taking evidence from persons, examining objects and sites and providing original and certified copies of relevant documents. These provisions should also cover the circumstances in which assistance may be refused.

Consideration should be given to specific clauses in the optional protocol protecting the privacy and other interests of children in matters associated with the investigation of offences under the protocol. This could include matters such as collection of evidence from children, acceptability of video evidence, medical examination procedures and the conduct of hearings.

The optional protocol should contain measures to allow the seizure and confiscation, where appropriate, of the proceeds of offences under the protocol. Consideration could also be given to provisions allowing the tracing, identification or freezing of proceeds, and the use of proceeds to assist with investigations or with the rehabilitation of child victims.

The optional protocol should contain appropriate measures to facilitate the transfer of offenders.

The optional protocol should contain provisions governing the activities of commercial carriers, to prevent their use for trafficking purposes. This could involve boarding procedures, searching vessels and so on.

The optional protocol should establish or require a system of cooperation between States Parties for the purpose of extradition. This could include matters such as extraditable offences, grounds for refusal of extradition and the effect of extradition treaties (or the absence thereof).

Consideration should be given to a provision in the optional protocol requiring treatment to be given to convicted abusers as part of efforts to prevent them from re-offending.

As to the scope of the optional protocol, it should be limited to sexual exploitation and should not extend to wider matters such as sale of organs, intercountry adoptions or non-sexual exploitation. An instrument that treats certain activities as criminal offences must have clearly defined limits to its application. Furthermore, many of the wider issues are being dealt with in other forums. For example, intercountry adoptions are covered by the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoptions and sale of organs is currently the subject of consideration by the World Health Organization.

The position of the Human Rights and Equal Opportunity Commission regarding the need for, and scope of, an optional protocol was recently endorsed by other national human rights institutions in the Asian and Pacific region. At its second meeting, held in New Delhi in September 1997, the Asia-Pacific Forum of National Human Rights Institutions resolved that "the proposed optional protocol to the Convention on the Rights of the Child should be supported and should focus on child sexual exploitation". Member institutions of the Asia-Pacific Forum will be taking steps to encourage their respective Governments to support this resolution. It is hoped that this will be of assistance in bringing about a speedy and successful completion of negotiations on the optional protocol.

The Asia-Pacific Forum of National Human Rights Institutions has the potential to make an important contribution to the fight against child sexual exploitation and the promotion of human rights generally in the region. The Australian Human Rights and Equal Opportunity Commission was instrumental in the establishment of the Asia-Pacific Forum in 1996 and currently provides the secretariat of the Forum.